No. 15892

IN THE

United States Court of Appeals
For the Ninth Circuit

M. H. Sherman Company, a Corporation,
Appellant

vs.

United States of America,
Appellee

APPELLANT'S REPLY BRIEF

Gust, Rosenfeld, Divelbess & Robinette
328 Security Building, Phoenix, Arizona

By Frank E. Flynn
Attorneys for Appellant

INDEX

Authorities Cited:

Texts Cited:

IN THE

United States Court of Appeals For the Ninth Circuit

No. 15892

M. H. Sherman Company, a Corporation,
Appellant

vs.

United States of America,
Appellee

APPELLANT'S REPLY BRIEF

The Appellee has stated the two issues that are involved in this appeal. One is a jurisdictional issue and the other is an issue on the merits. We will discuss the jurisdictional issue first.

JURISDICTION

Appellee's argument in support of its position on this question is based primarily on the Statute of Limitations. This statute is invoked on the premise that the original Complaint was an attempt to secure relief under the Tucker Act and the conclusion that the Amended Complaint is barred by the Statute of Limitations because it is based on the Civil Tort Claims Act. The premise is false and the conclusion is a non sequitur.

The Appellee has assumed that the first Complaint states a cause of action under the Tucker Act but was dismissed because the claim was in excess of $10,000 and beyond the court's jurisdiction. We strongly urge that the Complaint alleges facts constituting a cause of action under the Tort Claims Act but was dismissed because it did not allege jurisdiction under that Act. We also urge that the amendment did not change the cause of action but merely added the allegation showing jurisdiction.

Many times in the Federal Court complaints have failed to properly allege diversity of citizenship. Amendments have been permitted at the time of the trial and even after admittance of all the evidence. We have found no cases in the reports in which the courts have held that such an amendment could not be made after the running of the Statute of Limitations. The District Court of Appeals of California has passed upon an analogous situation,

Hess vs. Moody, 95 P. 2d 699 at page 702 (Headnote 6, 7).

In the present case the pleader could not have intended to bring this action under the Tucker Act or he would not have exceeded the jurisdictional amount. Isn't it more reasonable to conclude that the intention was to bring the action under the Tort Claims Act and by an oversight failed to allege jurisdiction?

The factual situation in both the original and amended Complaints is the same. That should be the principal test. The facts are the same and the evidence to prove the allegations of each Complaint would be identical. Even if we should accept Appellee's theory that the original Complaint was brought under the Tucker Act,

it does not follow that the Amended Complaint would be barred by the Statute of Limitations. The Supreme Court of the United States has passed upon that question.

U. S. vs. Memphis Cotton Oil Company, 288 U. S. 62, 77 Law Ed. 619

We quote from Headnote 2 of the opinion in the above case:

"A change of the legal theory of the action, 'a departure from law to law,' has at times been offered as a test. (Citing authorities). Later decisions have made it clear that this test is no longer accepted as one of general validity. (Citing authorities)."

The following authorities also sustain our position:

34 AM. JUR. 217-219, paragraphs 266-267

L. J. Bordeaux vs. Tucson Gas Company, 114 Pac. 547 (Ariz.); 33 L. R. A. New Series 196 (also annotation)

Nesbitt vs. Pollak, 80 A. 2nd 54 at page 56

District of Columbia vs. Leys, 63 Fed. 2d 646

Deloach vs. Griggs, 72 S. E. 2d 647

In the Arizona case above cited the Supreme Court of Arizona has applied the liberal rule in regard to an amended pleading relating back to the original pleading where the Statute of Limitations has intervened. In the case of Nesbitt vs. Pollak above cited, the Supreme Court of South Carolina quotes from the federal decision in the District of Columbia case above cited:

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transac-

> tion, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Certainly the claim in each of the Complaints, the original and the amended, arose out of the same transaction and occurrence.

In the *Deloach vs. Griggs* case above cited the Supreme Court of South Carolina quotes from 34 Am. Jur. at page 217, which we have already cited. The quotation is as follows:

> "It is also stated in 34 Am. Jur., Sec. 263, Page 217, that '* * * there is a large and respectable body of authorities * * to the effect that an amended pleading which supplies a missing allegation without the presence of which in plea and proof there could be no recovery relates back, and is unaffected by the statute of limitations expiring after the suit was begun and before the amendment was made.' "

The Supreme Court of South Carolina also refers to a prior decision of that Court to the effect that shifting of the basis of an action from a state to a federal law would work no prejudicial surprise and would not introduce a new cause of action. The South Carolina case was affirmed by the Supreme Court of the United States,

> 239 U. S. 252; 60 Law Ed. 320.

ARGUMENT ON THE MERITS

The issue on the merits is not, as stated by Appellee, whether the government, under the terms of the lease, was required to remove improvements from Appellant's land. The question in our opinion is whether the Appellee could remove parts of the structures without

removing all. It is admitted in the Stipulation in evidence (R 32) that the damage to the premises by reason of the concrete slabs would be the cost of removal. As stated in our Opening Brief, removal of the super structure left the concrete part useless and worthless and a damage to the premises in the sum of $17,500.

We will not go into a discussion or analysis of the authorities cited by Appellee on the contractual obligation of a tenant to remove improvements. We do not believe they have any application to the facts in this case.

The only way the contract enters into a determination of the issues is that by reason of the contract a relationship was created between Appellant and Appellee, that of landlord and tenant, and that by reason of that relationship a duty arose created by the contract but not a part of its terms. The authorities cited in our Opening Brief sustain this theory.

As far as we have been able to determine, it has been the contention of the Appellee that paragraph 12 of the contract excuses the government from any liability for the damages caused by the failure to remove the concrete structures. So, it is because of the Appellee's theory that an interpretation of the contract was brought into this case.

We respectfully submit that the option to remove the improvements could not be exercised in part by the tenant to the damage of the premises. If the Appellee had removed the roof from each of the buildings, wouldn't the Court be justified in saying that it must pay for the removal of the remaining part? By removing the buildings Appellee left some useless and valueless concrete slabs and according to the stipulation,

this resulted in damages to the premises in the sum of $17,500. There is no question as to the amount of damage or the cause of it. The only question is as to the liability of the Appellee.

Appellee claims that the great increase in value brought about by time and circumstances should be taken into consideration for the benefit of the Appellee as an offset to the damage to the property. This is going outside the record for an absurd argument reduced to the ridiculous.

CONCLUSION

Based upon the facts and the authorities cited by Appellant, the trial court had jurisdiction and should have entered judgment for plaintiff (Appellant). The case should be reversed and remanded with directions to enter judgment in the sum of $17,500.00.

Respectfully submitted,

Gust, Rosenfeld, Divelbess & Robinette
328 Security Building, Phoenix, Arizona

By Frank E. Flynn
Attorneys for Appellant